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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 752

GLO CO., an Illinois Corporation,

Petitioner,

vs.

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Respondents.

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In the motion to dismiss, filed in the District Court by the respondents, it is stated:

> "The plaintiff, GLO CO., is a corporation for pecuniary profit, organized and existing under and by virtue of the laws of the State of Illinois, and plaintiff had not, at the time of any of the transactions set forth in the complaint, obtained a permit from the Secretary of State of the State of Texas to transact business in this state, as required by Article 1529, Revised Civil Statutes of Texas, and the plaintiff corporation was at all of said times engaged in transacting the corporate business in the State of Texas which its charter authorized and which constituted the transaction of intrastate business. Therefore, under Article 1536, Revised Civil Statutes of Texas, plaintiff cannot maintain this action." (Tr. 119-120.)

Article 1529, **Revised Civil Statutes of Texas,** relating to permits to foreign corporations to transact business in Texas, provides:

> "Any corporation for pecuniary profit, except as hereinafter provided, organized or created under the laws of any other state, or of any territory of the United States, or of any municipality of such state or territory, or of any foreign government, sovereignty or municipality, desiring to transact or solicit business in Texas, or to establish a general or special office in this state, shall file with the Secretary of State a duly certified copy of its articles of incorporation; and thereupon such official shall issue to such corporation a permit to transact business in this state for a period of ten years from the date of so filing such articles of incorporation."

Article 1536, **Revised Civil Statutes of Texas,** relating to penalties applicable where a foreign corporation fails to obtain a permit to transact business in Texas, provides:

> "No such corporation can maintain any suit or action, either legal or equitable, in any court of this state upon any demand, whether arising out of contract or tort, unless at the time such contract was made, or tort committed, the corporation had filed its articles of incorporation under the provisions of this Chapter."

It is undisputed that the plaintiff, Glo Co., an Illinois corporation, has never obtained a permit to transact business in the State of Texas. (Tr. 97-98, 234.)

In **Erie Railroad Co. v. Tompkins,** 304 U. S., 64, 82 L. ed., 1188, 58 S. Ct., 817, 114 ALR, 1487, the Supreme Court of the United States said: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern."

The respondents, T. F. Murchison and Murchison and Company, by their motion for dismissal in the District Court, invoked the doctrine so clearly announced in **Erie Railroad Company v. Tompkins, supra,** namely, that "the law to be applied in any case is the law of the state." Accordingly, respondents rely on the two state statutes quoted above (Arts. 1529 and 1536) and on a decision of the Supreme Court of Texas applying and construing said statutes, **Normandie Oil Corp. v. Oil Trading Co.,** 163 S. W. 2d, 179, hereinafter quoted from, as authority for the proposition that petitioner cannot maintain this action in any

court in Texas. Hence, when the law of the State of Texas — as declared by the legislature of Texas and by the Supreme Court of Texas — is applied in a federal court within the state, the federal court will enter the same order which would be appropriate in a state court — an order of dismissal.

Articles 1529 and 1536 of the Texas Statutes do not, of course, apply to interstate business. But the business being transacted by the petitioner, Glo Co., at the times it acquired and later assigned the leasehold and mineral interests referred to in the complaint and described in the exhibit attached thereto, was, under the law as declared by the Supreme Court of Texas, intrastate business — a business having to do with the transfer of title to oil and gas leases which is a transaction involving the sale of an interest in Texas lands.

In **Normandie Oil Corp. v. Oil Trading Co., supra,** the Supreme Court of Texas said:

> "It is contended that the transaction constitutes interstate commerce. The Oil Trading Company, Inc., contended that its right to recover a commission is based not merely on the contract under which the property was listed for sale, but also on the fact that it was the 'procuring cause' of the sale, and on the fact that it did certain work resulting in a sale. The subject matter of the transaction was the sale of an interest in Texas land. The only 'commerce' involved was the transfer of title to an oil and gas lease, which, under the uniform Texas decisions, constitutes a determinable fee in real property."
>
> "The fact that part of the negotiations occurred in New York and part occured in Texas would not remove this case from the provisions of the fore-

going articles (Arts. 1529 and 1536). Here the business to be done by the Oil Trading Company, Inc., in order to earn its commission, was the conducting of negotiations in an effort to effect a sale of the Krohn lease, which was on land situated in Texas. The evidence shows beyond dispute that if such negotiations were conducted, they were conducted in part in Texas. In other words, an indivisible and essential part of the services claimed to have been rendered by this broker, in an effort to make the sale, was performed in Texas."

"This court has held that a single transaction will constitute the doing of business within the meaning of Articles 1529 and 1536, requiring foreign corporations to obtain permits before doing business in this state. Smythe Co. v. Fort Worth Glass & Sand Co., 105 Tex. 8, 142 S. W. 1157."

"The construction of Article 1529 was involved in the case of Smythe Co. v. Fort Worth Glass & Sand Co., supra, and in the opinion in that case this court, in defining what transactions were brought within the purview of such Article, said (105 Tex. 8, 142 S. W. 1161): 'It will be observed that a desire on the part of the foreign corporation to do either of three things, to transact business, or solicit business, or establish a general or special office in this state, is required to procure a permit. The fact that the act contemplates the transaction of business in this state without the establishment here of a general or special office suggests the idea that it was the evident intent of the Legislature to prevent a single, isolated, or any transaction of business in this state by a foreign corporation when done in pursuance of its general business as authorized by its charter.' "

The purpose clauses of the charter of respondent, Glo Co., an Illinois corporation, are as follows:

> "The acquisition, ownership, development, management, control, sale and other disposition of oil, gas and other minerals, including the prospecting for and discovery of minerals by any and every means, including the drilling of wells and the opening of mines.
>
> "The acquisition, ownership and disposition of oil, gas, and mineral leases and the lessees' interest thereunder, and the leasing of oil, gas, or other minerals owned by the Company to others.
>
> "The conducting of geological exploration and the making of drilling contracts in connection with the discovery and development of oil, gas and other minerals." (Tr. 193-194.)

It is shown by the allegations in the complaint and, particularly, by the exhibit attached to the complaint, that petitioner, Glo Co., in all of its transactions with respondents in this action was engaged in the business for which the corporation was organized. Those transactions had to do with the acquisition and asssignment of leasehold and mineral interests in lands within the State of Texas, which, under the holding of the Supreme Court of Texas in **Normandie Oil Corp. v. Oil Trading Co., supra,** are intrastate transactions and constitute doing business within the State of Texas.

An examination of the exhibit attached to the complaint, being an assignment dated September 29, 1941, shows that the instrument was captioned, or headed, "State of Texas, County of Bexar." It describes leasehold and mineral interests in lands situated in Jim Wells County, Texas. And the instrument was executed and acknowledged by

Leander J. McCormick, as President of the corporation, Glo Co., before a Notary Public, in and for Bexar County, Texas. Thus, the very instrument which is made the basis of the complaint in this action shows upon its face that petitioner, an Illinois corporation, was transacting its corporate business in the State of Texas. Moreover, the complaint and the exhibit attached thereto show that such corporate business being transacted in Texas was in the form of many and varied transactions relating to the acquisition, the development, exploration, and discovery of minerals in and upon lands in Texas under numerous oil and gas leases which it had theretofore acquired.

It is significant that the exhibit to the complaint (Tr. 44-45) contains the following provisions:

> "The assignor (Glo. Co.) is at the present time negotiating and attempting to procure new oil and gas leases covering lands located in the Premont Field, and it agrees to use its best efforts to procure such leases, and if successful in such efforts it agrees to assign same to the assignee, or his successors or assigns, subject to all the terms and provisions of this assignment, and with the reservation of an overriding royalty of one-sixteenth of seven-eights of all the oil, gas, and other minerals produced from the lands covered thereby, as hereinabove provided, with reference to the leases herein assigned."
>
> "The assignor is also negotiating with the holders of the overriding royalties and the oil payments hereinabove described for a reduction in the amounts thereof, and it agrees to carry on such negotiations in good faith and use its best efforts to obtain such reduction, and if successful in doing so agrees that the same shall be for the benefit of the assignee, his heirs, successors or assigns, and

shall not result in an increase in overriding royalty reserved by the assignor."

While these respondents contend that petitioner's complaint and exhibit attached thereto show, as a matter of law, that petitioner, an Illinois corporation, was transacting its corporate business in Texas, without having a permit to do business in Texas, such fact is also clearly shown by the following:

1) Affidavit of Joy Alexander McCartney, showing his activities for and on behalf of petitioner in negotiating leases on parts of the Seeligson Ranch in Jim Wells County, Texas, some of which leases are the identical leases covered by the written assignment attached to the complaint as an exhibit. (Tr. 166.)

2) The allegations made by petitioner, Glo Co., in its complaint filed in Civil Action No. 478, in the U. S. District Court, Western District of Texas, wherein McCartney was named as defendant, and wherein this same petitioner as plaintiff in that case alleged, "that the defendant agreed to devote his time and efforts to the acquisition of such leasehold and mineral estates as the agent, trustee, and fiduciary, for plaintiff." (Supp. Tr. 5.)

3) Affidavit of T. F. Murchison, showing in detail his transactions with petitioner in dealing with leasehold and mineral interests in lands located in Jim Wells County, Texas. (Tr. 128.)

4) Affidavit of J. A. Kimmey, who acted as agent for Tom Graham Oil Company in negotiations with petitioner leading up to the execution of a drilling contract between petitioner, Glo Co., and Tom Graham Oil Company at Corpus Christi, Texas, for drilling a well on the Seelig-

son Ranch in Jim Wells County, Texas, which contract and $7500.00 were deposited in escrow in a Corpus Christi, Texas, bank.

5) Affidavit of Leander J. McCormick, President of petitioner, Glo Co., dated February 21, 1941, made before a Notary Public in Nueces County, Texas, showing that the above mentioned well had been drilled and completed according to the contract. (Tr. 172.)

Thus, it is shown by the record without dispute, that petitioner, at and before the time of the making of the contract, which is attached to the complaint as an exhibit, was extensively engaged in the transaction of its corporate business in the State of Texas. And it must be borne in mind that petitioner did not acquire its rights and titles in said properties under the contract which is attached to the complaint and made the basis of its action; but petitioner, long prior to the date of that contract, had acquired, by various transfers and assignments, leasehold and mineral interests which were dealt with in the contract attached to the complaint, at a time subsequent to the acquisition of such properties by petitioner, for the purpose of exploration and development of said properties.

All of the counts in petitioner's complaint have direct reference to and seek relief under a contract which petitioner made with respondents and executed and delivered in the State of Texas on September 29, 1941, which was a date long subsequent to the date of the several assignments and transfers where rights and titles had been first acquired by petitioner in oil and gas leases on Texas lands. Petitioner executed what was, in effect, an operating contract and assignment relating to the leasehold and mineral interests which it had theretofore acquired while transact-

ing business in Texas without a permit; and it is that operating contract and assignment dated September 29, 1941, which petitioner makes the basis of its action. All of the relief sought by petitioner in its complaint in the trial court arises out of and is based upon said operating contract and assignment, wherein, by the very terms of the contract, it was shown to be transacting business in Texas and also shown to contemplate the transaction of its corporate business in Texas in the future.

In none of the cases cited and relied upon by petitioner was the action based upon a contract, as we have in this case, dealing with the operation of property in Texas acquired by a foreign corporation in transacting its corporate business in Texas. The action of petitioner here is based upon a contract, made subsequent to the acquisition of the property in Texas and at a time when petitioner was transacting its corporate business in Texas.

II.

Under the Federal Rules of Civil Procedure, special findings of fact and separate conclusions of law are not required in an order sustaining a motion to dismiss where such order shows upon its face that it is not a judgment against the plaintiff on the merits.

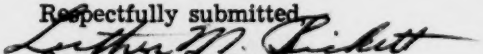
Federal Rule 41(b), relating to "Involuntary Dismissals," requires that this court make findings of fact and conclusions of law in cases tried before the court "if the court renders judgment on the merits against the plaintiff." Rule 52, relating to "Findings by the Court," states: "Findings of fact and conclusions of law are unnecessary on decisions of motions under rules 12 or 56, or any other motion except as provided in 41(b)." When the two rules are construed together, findings of fact and con-

clusions of law are not required in an order sustaining motions to dismiss, because such order would not be a "judgment on the merits against the plaintiff," as mentioned in Rule 41(b).

In any event, however, the order of dismissal (Tr. 220) does set forth the grounds of the motions to dismiss and then states, "that the material facts set forth in said motion have been established."

WHEREFORE, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,



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